Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

No. 75-576

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK ERHARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-576

FRANK ERHARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was wrongfully convicted of violating 16 U.S.C. 703, the Migratory Bird Treaty Act, because his admitted possession of a prairie falcon was lawful.

After a trial before a federal magistrate in the United States District Court for the Western District of Oklahoma, petitioner was convicted of unlawful possession of a prairie falcon, a migratory bird within the meaning of 50 C.F.R. 10.13, in violation of Section 703. Imposition of sentence was suspended, and petitioner was placed on two years' probation upon condition that he refrain from engaging in falconry. The district court and court of appeals affirmed (Pet. App. A).

The evidence at trial showed that in November 1973 petitioner found a falcon in his pigeon cage, where it had killed three of his domestic fowl and had dislocated

its wing trying to escape. Petitioner splinted the wing and cared for the falcon until it healed three weeks later, and thereafter continued in possession of the bird (Tr. 29-30, 34-35). In March, 1974, Special Agent Keith McCartney of the United States Fish and Wildlife Service, Department of Interior, observed petitioner in possession of the falcon and, after investigation, filed a complaint under Section 703.

1. The judgment of the court of appeals was entered on August 19, 1975. The petition for a writ of certiorari was not filed until October 16, 1975 and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the questions presented do not merit further review.

2. 16 U.S.C. 703 provides in part:

> [E]xcept as permitted by regulations * * * it shall be unlawful * * * by any means or in any manner, to * * * take, capture * * * [or] possess, * * * any migratory bird * * * included in the terms of the conventions between the United States and Great Britain * * * and the United Mexican States * * *.

Regulations promulgated under this statute prohibit possession of a migratory bird except "in accordance with laws and regulations of the State where such act occurs" (Pet. App. C; 37 Fed. Reg. 22633 (1972)). Petitioner contends that his possession of the falcon did not violate Section 703 because (a) under Oklahoma law he was entitled to kill the bird, which he discovered in the act of killing his pigeons, but chose instead to mend its injury, and (b) he had a state permit purportedly entitling him to possess the falcon. Neither contention has merit.

Despite the fact that Oklahoma law[1] permits the owner of domestic fowl to kill any hawk, owl, or eagle that is in the act of destroying his fowl, *possession* of migratory birds, including the prairie falcon, remains expressly

[1]29 Okla. Stat. Anno. § 317 (1970).

prohibited under both state and federal law. Therefore, if petitioner elected not to kill the falcon, he should have given the wounded bird to state or federal fish and wildlife authorities. As a student majoring in zoology and wildlife ecology and a member of the Falconeers' Association (Tr. 26-27), petitioner certainly was aware of the appropriate agencies to take custody of the injured falcon. Even assuming *arguendo* that he properly could have retained possession of the bird during its three-week recovery period, petitioner had no right to continue in possession or to appropriate the bird to his own uses once it had healed sufficiently to return safely to the wild.[2]

Petitioner's possession of a state falconry permit (Tr. 27, 30-31) also did not entitle him to possess the prairie falcon. In the first place, the permit only authorized the possession of not more than three hawks, owls, or eagles that are *nonindigenous* to North America (29 Okla. Stat. Anno. § 318 (1970)), not the *Falco mexicanus*, or prairie falcon. Moreover, the permit does not render lawful a possession that was unlawfully obtained. The Oklahoma falconry regulations state:

> No person may take any raptore or egg of a raptore from the wild in Oklahoma, except the sharpskinned, Coopers hawk and Goshawk.

Petitioner conceded at trial that the prairie falcon was not one of the excepted classes of raptore and that it had in fact been captured from the wild (Tr. 30-32). Thus, petitioner's permit did not extend to the prairie falcon he was convicted of illegally possessing.

3. Petitioner apparently contends that the regulations listing and defining migratory birds, possession of

[2]Petitioner trained the bird after its recovery and entered it in falconry meets (Tr. 35; Pet. 4).

which are proscribed by Section 703, constitute an illegal delegation of legislative authority and violate due process. Although the prairie falcon was not named as a migratory bird in the 1936 convention between the United States and Mexico, the treaty provided that "by common agreement" (50 Stat. 1314) between the contracting parties other birds might be added to those specified in the treaty. Under this authority the family *falconidae* (which includes falcons and hawks) was added in March 1972 to the list of birds protected by the treaty and by Section 703 (Pet. App. D; 37 Fed. Reg. 9223 (1972)). 50 C.F.R. 10.13 contains a complete listing, by common and scientific names, of the migratory birds subject to the provisions of the treaty. Section 703 clearly alerts the reader to the necessity of referring to the conventions and regulations, and the list of protected birds in the regulations is unambiguous.

In making international agreements the President does not exercise legislative authority, since a treaty is not a legislative act. *United States* v. *Rauscher,* 119 U.S. 407. It is primarily a contract between nations. *Whitney* v. *Robertson,* 124 U.S. 190. The treaty-making power is constitutionally vested in the President, with the advice and consent of the Senate. United States Constitution, Art. II, Section 2. Here, by approving the treaty that provided for future agreements by the respective parties to define additional migratory birds, the Senate gave its consent to such action. In conferring the treaty-making power, the Constitution does not prescribe the time or method by which the Senate shall give its advice and consent, and it can as well be given before negotiations as after. The President may be authorized to enter into agreements that do not require subsequent ratification. *Altman & Co.* v. *United States,* 224 U.S. 583.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12